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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHARLES GRAHAM, Derivatively on Behalf of Nominal Defendant LEAP WIRELESS INTERNATIONAL, INC., Plaintiff, v. S. DOUGLAS HUTCHESON, AMIN KHALIFA, GRANT BURTON, DEAN M. LUVISA, MICHAEL B. TARGOFF, JOHN D. HARKEY, JR., ROBERT V. LAPENTA, MARK H. RACHESKY, M.D., and JAMES D. DONDERO, Defendants, and LEAP WIRELESS INTERNATIONAL, INC., Nominal Defendant.	CASE NO. 08-CV-0246 L NLS (Derivative Action) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NOMINAL DEFENDANT LEAP WIRELESS INTERNATIONAL, INC.'S MOTION TO DISMISS DERIVATIVE COMPLAINT** Judge: The Hon. M. James Lorenz Courtroom: 14 Hearing Date: August 4, 2008 Hearing Time: 10:30 a.m.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

By this derivative action, Plaintiff – one shareholder of Leap Wireless International Inc. ("Leap" or "the Company") – purports to seize corporate control from Leap's duly elected board of directors, stand in Leap's shoes, and prosecute claims that belong to Leap. In a Complaint dominated by conclusory, boilerplate allegations, Plaintiff asserts claims for which he has no standing. He contends that Leap's entire board and senior management team are liable for breach of fiduciary duties and fraud based on nothing more than Leap's restatement in December 2007 to correct certain errors in accounting under Generally Accepted Accounting Principles ("GAAP"). Plaintiff's cut-and-paste quotations from Leap's forthright reports to investors – which Plaintiff does not dispute – show that the restatement corrected errors that involved no hint of misconduct or wrongdoing by anyone. It is well established that the mere fact of a restatement, without more, does not imply wrongdoing, much less entitle a shareholder to rush to the corporate scene, purport to take charge, and sue everyone in sight on the company's behalf.

Leap is a Delaware corporation. Under fundamental principles of Delaware corporate law, the decision to assert corporate claims is a business judgment made by the board of directors, not by the shareholders. Del. Code tit. 8, § 141(a). This principle of board control is universal and is incorporated in Federal Rule of Civil Procedure 23.1, which requires the plaintiff in a derivative suit to plead "with particularity" his efforts to procure board action on the alleged claims through a pre-suit demand. *See* Fed. R. Civ. P. 23.1. In order to establish standing to assert corporate claims, the plaintiff must allege with particularity *facts* demonstrating either that (1) he made a pre-suit demand which the board wrongfully refused or (2) a pre-suit demand would have been futile because a majority of the board could not exercise valid business judgment due to disabling self-interests and/or lack of independence. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). Here, Plaintiff did not make a pre-suit demand and has utterly failed to allege any legally cognizable excuse.

Indeed, the allegations reflect no real effort to meet the standards for pleading an excuse. The Complaint is based entirely on formulaic contentions that Leap's five-member board would have been incapable of exercising valid business judgment on a demand because they all "knew"

that Leap's accounting was incorrect, and/or that its internal controls over financial reporting were ineffective, and deliberately "caused," "permitted" or "failed to prevent" Leap from issuing inaccurate financial statements. Complaint ¶¶ 34–38. Plaintiff's tired strategy of trying to make an end run around the demand requirement by suing the whole board and declaring, *ipso facto*, that the directors have disabling interests in avoiding personal liability, is deficient as a matter of law. To excuse failure to make a demand, Plaintiff must allege *particularized facts* establishing that a majority of the board when the suit was filed faced a "substantial likelihood" of personal liability for the alleged wrongdoing. *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

The generic contentions in this case do not pass a blush test for factual particularity. The "fiduciary shield" provision in Leap's certificate of incorporation protects Leap's directors from personal liability to the maximum extent permitted under Delaware law. Request for Judicial Notice ("RJN"), Exh. A, at 3, 4; Del. Code tit. 8, § 102(b)(7). The shield protects the directors from liability for all but intentional misconduct, bad faith, or disloyalty. Plaintiff's allegations do not demonstrate garden-variety negligence, much less egregious conduct outside the protection of the shield. To the contrary, the few *factual* allegations in this Complaint show the board's diligence and good faith in overseeing Leap's financial reporting – including by establishing an Audit Committee that met regularly with Leap's management and independent financial statement auditors. Complaint ¶¶ 32, 68–70. Aside from Plaintiff's bare assertions, nothing in the Complaint suggests that the Audit Committee or any other member of Leap's board was informed of, or ignored, mistakes in accounting or deficiencies in internal controls.

Piling one fatally defective claim on another, Plaintiff asserts that two directors who sold stock several months before Leap announced discovery of the accounting errors thereby engaged in illegal "insider trading" on secret knowledge of the errors. Complaint ¶¶ 42–45. His conclusory allegations fail to state any claim at all, much less a "substantial likelihood" of liability. As many courts have recognized, it is perfectly normal, lawful, and expected for directors and officers to trade in a company's securities. Plaintiff has pled nothing to suggest that the two directors had any idea of the existence of accounting errors when they sold stock.

Plaintiff's final claim accuses Leap's directors of fraud in violation Section 10(b) of the 1934 Securities & Exchange Act for misrepresenting Leap's historical financial statements. Plaintiff ignores the stringent pleading standards required to state a securities fraud claim under the Private Securities Litigation Reform Act ("PSLRA"), and utterly fails to demonstrate any risk of director liability. Of greater concern, this claim potentially places Leap in harm's way. Leap is currently *defending* against the same spurious allegations made *against* Leap and its officers in a parallel investor class action pending before this Court in *HCL Ltd. Partners v. Leap Wireless International, Inc.*, Case No. 07cv2245 BTM (NLS). Plaintiff's assertion of a Section 10(b) claim that conflicts with Leap's own defense underscores the ill-considered nature of this case, and the importance of the standing limitation imposed by the demand requirement.

Perhaps recognizing the fatal deficiencies of his action, Plaintiff has not yet served it. The deadline for service will expire on June 6, before this motion is heard. Fed. R. Civ. P. 4(m). If Plaintiff does not serve the action, it should be dismissed under Federal Rule 41(b) for failure to prosecute. If he serves the action, it should be dismissed under Federal Rule 12(b)(6) because Plaintiff has not alleged standing to sue derivatively on behalf of Leap.

II. STATEMENT OF FACTS AND ALLEGATIONS

A. Parties and Claims

Leap is a wireless communications carrier that offers cell phone service in the United States under the Cricket® and Jump® Mobile brands. Complaint ¶ 8. Leap is incorporated in Delaware and headquartered in San Diego. *Id.* Leap's stock trades publicly on NASDAQ. *Id.* ¶ 59. Plaintiff alludes indirectly to the fact that Leap emerged from a bankruptcy reorganization in August 2004. *Id.* ¶¶ 61 at 17:27-28; 62 at 20:6-7 (referring to "Successor" and "Predecessor" companies). Leap's management team, under the supervision of the board, led Leap through the challenges of rapid growth after emergence from bankruptcy, during which time the stock price increased from $20 per share in 2004 to an alleged high of more than $98 in 2007. *Id.* ¶ 40.

The individual defendants consist of the management team and board members who served Leap during this demanding phase of its corporate life. Leap's board of directors has five members: Doug Hutcheson, the CEO and interim CFO who has been with Leap in a variety of

leadership roles since 1998 (*id.* ¶ 9), and four outside directors who are not employees or officers of Leap, Mike Targoff, John Harkey, Robert LaPenta, and Mark Rachesky. *Id.* ¶¶ 16, 18, 19, 21. These five individuals constituted the board when this lawsuit was filed and, therefore, are the only defendants relevant to whether Plaintiff's failure make a pre-suit demand was excused. The directors serve in the following capacities (*id.* ¶¶ 16, 18, 19, 21):

	Board Member	**Audit Committee**	**Compensation Committee**	**Officer**
Rachesky	✓		✓	
Harkey	✓	✓		
LaPenta	✓	✓		
Targoff	✓	✓	✓	
Hutcheson	✓			✓

The four remaining defendants include a former outside director, James Dondero (*id.* ¶ 22), Leap's former CFO from July 2006 through September 2007, Amin Khalifa, (*id.* ¶ 11), Leap's former acting CFO and Vice President, Finance and Treasurer, Dean Luvisa (*id.* ¶ 13); and Leap's Chief Accounting Officer and Controller at relevant times, Grant Burton (*id.* ¶ 12).

Plaintiff asserts three claims on behalf of Leap. In sweeping style, he contends that all of the individual defendants are liable to Leap for (1) breach of fiduciary duty by "willfully ignoring the obvious and pervasive problems with Leap's accounting and internal control practices" and "knowingly disseminating … false financial statements" (*id.* ¶ 80), and (2) violation of Section 10(b) by engaging in "fraud and deceit" upon which Leap allegedly relied in issuing unspecified stock and options (*id.* ¶¶ 86–89). In addition, Plaintiff contends that four defendants who sold Leap stock months before Leap's announcement that it had even discovered the accounting errors are liable for (3) unjust enrichment for illegal insider trading on purported advance "knowledge" of the errors (*id.* ¶¶ 45, 83).

B. The 2007 Restatement

Leap discovered accounting errors in the course of a comprehensive internal review of its service revenue and forecasting processes initiated in September 2007. *Id.* ¶ 60 at 17:12-13. On November 9, 2007, Leap announced discovery of the errors. *Id.* ¶ 57. Leap reported that, in

accordance with GAAP, it would restate its financial statements for the years ending 2004, 2005, and 2006, and the first two quarters of 2007. *Id*. Leap explained the nature of the errors and their effects. As Plaintiff alleges, without dispute, many of the same errors caused Leap's net income to be understated and overstated in different financial reporting periods. *Id*. ¶¶ 57, 61.[1] Leap also identified "classification errors" that had no effect on income or expenses, but simply altered the presentation of assets and liabilities on Leap's balance sheet. As alleged in the Complaint, Leap described the three main categories of errors as follows:

> [1] The most significant adjustment relates to the Company's prior <u>accounting for a group of customers who voluntarily disconnected service</u>. These customers comprised a small percentage of the Company's disconnected customers. For these customers, approximately one month of deferred revenue that was recorded when the customers' monthly bills were generated was mistakenly recognized as revenue after their service was disconnected.
>
> [2] The Company also identified other errors relating to the <u>timing and recognition of certain service revenues and operating expenses</u>. The effect of the timing errors varied across periods. The error with the largest variation across periods related to the reconciliation of billing system data for pay in arrears customers. This error resulted in an understatement of revenue in 2004 and 2005 and an overstatement of revenue in subsequent periods as the number of pay in arrears customers in the Company's customer base declined.
>
> [3] In connection with management's review, errors were also identified relating to the <u>classification of certain components of equipment revenues and cost of equipment</u>. Prior to June 2007, approximately $120 million of revenue from the sale of equipment was offset against related cost of equipment and reported on a net basis. The reclassification of these revenues and costs on a gross basis will not impact operating income.

Id. ¶ 57 (emphasis and numbering added), quoting November 9, 2007 press release, RJN, Exh. B, at 8–9.

On December 14, 2007, Leap reported its results for the third quarter of 2007 (ending September 30, 2007), which were not restated. Complaint ¶ 61. Leap provided additional details explaining and quantifying the anticipated restatement, including the understatement and overstatement of revenues at different times. *Id*. On December 26, 2007, Leap filed its restated

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[1] Plaintiff's evident assumption that the errors were deliberately planned in order to overstate Leap's results makes no sense given that the same errors understated Leap's results, generally in earlier periods when the errors began. *Cf. id.* ¶¶ 38–41.

financial statements for the affected periods (2004, 2005, 2006, and the first two quarters of 2007) and again described the errors (*id.* ¶ 62) as well as the deficiencies internal controls that led to the errors (which Plaintiff selectively ignores). *See* Note 4, below.

Restatements are governed by GAAP. They are defined as revisions of previously issued financial statements "to reflect the correction of an **error** in those financial statements." SFAS No. 154, RJN, Exh. C, at 18 (emphasis added). A restatement corrects "'mathematical errors" and "mistakes in the application of accounting principles" when the financial statements were prepared. *In re Interpool, Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 18112, *15 (D. N.J. Aug. 17, 2005), *quoting* APB No. 20 (superseded by SFAS No. 154). Contrary to Plaintiff's evident assumption, Leap's restatement is not an admission of deliberate or knowing errors. The cases are legion in the Ninth Circuit and elsewhere that "the mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish [a culpable state of mind]." *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 391 (9th Cir. 2002).[2] Plaintiff has alleged *not a single fact* suggesting that the accounting errors in this case were the result of any misconduct or attempt to manipulate Leap's financial results. In hindsight, it seems fairly unsurprising that errors might have arisen as Leap emerged from bankruptcy to rapid growth. *See* Complaint ¶ 40 (commenting on Leap's growth from 2004 to 2007).

As alleged in the Complaint, the restatements had a net cumulative impact of reducing Leap's service revenue by about $8 million and its operating income by about $23 million over three and a half years. *Id.* ¶ 3. To put the relative magnitude of these adjustments in some context, Leap's cumulated corrected service revenue was about $2.68 billion and cumulated

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[2] *See, e.g., In re Guess?, Inc. Sec. Litig.*, 174 F. Supp. 2d 1067, 1078 (C.D. Cal. 2001) ("violations of GAAP are just as consistent with the existence of an accounting problem of unknown scope as they are with intentions to hide the performance of the company"); *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1009-10 (S.D. Cal. 2000) ("Violations of GAAP or GAAS, standing alone, … provide no specific facts upon which a court can infer … state of mind").

corrected operating income was about $136 million (excluding during bankruptcy). RJN, Exh D. at 29–38 ; Exh. E at 49–52.[3]

C. Audit Committee Oversight of Leap's Financial Reporting

Plaintiff seeks to blame Leap's board of directors for the restatement, especially the Audit Committee, by claiming – without any alleged factual basis – that the Audit Committee "knew that they were not properly accounting for the Company's… [revenues and expenses] under [GAAP]." Complaint ¶ 2. Ironically, Plaintiff's allegations reflect that Leap's Audit Committee was diligent in assuring that it was adequately informed – but *not* that the Audit Committee or any other director had advance knowledge of the errors that were corrected in the restatement. As Leap disclosed, those errors were only identified after Leap initiated an in-depth review in September 2007. *Id.* ¶ 60 at 17:12-13.

As Plaintiff alleges, Leap's three-person Audit Committee was (and is) appropriately composed of outside, non-officer directors. *Id.* ¶¶ 16, 18, 19 (Targoff, Harkey, and LaPenta). The Audit Committee Charter, which Plaintiff quotes at length, lists the Audit Committee's oversight responsibilities, including, among other things, to "meet with management, independent auditors and senior internal audit executives" in connection with "major issues as to the adequacy of the Company's internal controls," "annual audited financial statements," and "quarterly financial statements." *Id.* ¶ 32. Plaintiff does not allege that the Audit Committee abdicated, ignored, or otherwise failed to perform any of these responsibilities.

To the contrary, Plaintiff makes much of the Audit Committee's hard work and diligence. The Audit Committee met 26 times during the three years covered by the restatement (nine times in 2004, ten times in 2005, and seven times in 2006). *Id.* ¶¶ 68–70. The Audit Committee met directly with management, which is responsible for preparing the financial statements, and with Leap's independent auditor, PwC, which is responsible for auditing the financial statements. *Id.*

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[3] As the Complaint suggests, Leap separately reported the financial results of pre- and post-bankruptcy entities. (Complaint ¶¶ 61–62). During the pre-emergence period, from January 1 through July 31, 2004, Leap experienced negative operating income. The numbers offered for comparison in the text are post-bankruptcy.

While the Audit Committee took all the right steps to inform itself, Plaintiff does not (and cannot) allege that management or PwC informed the Audit Committee of the accounting errors *before* those errors were discovered in the fall of 2007. *Id.* ¶ 67.[4]

D. Demand Futility Allegations

Plaintiff alleges that a pre-suit demand on Leap's board would have been futile because the board is "incapable of independently and disinterestedly" considering a demand to act on the alleged claims. *Id.* ¶ 77. Plaintiff says nothing about Rachesky in support of this contention, thus essentially conceding that Rachesky is both disinterested and independent. *Id.* Plaintiff asserts that Harkey, LaPenta, and Targoff face a "substantial likelihood" of liability for breach of fiduciary duty and violation of Section 10(b) based on their Audit Committee service. *Id.* ¶ 77d. He alleges that Hutcheson faces the same exposure based on his management status. *Id.* ¶ 77b.

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[4] Although Plaintiff spills a fair amount of ink on the board's alleged disregard of "internal control" deficiencies (*e.g.*, *id.* ¶¶ 31, 34, 35), he selectively ignores Leap's restatement disclosure on this very point. RJN, Exh. D, at 40 (Form 10-K/A); Ex. E, at 53–54 (Form 10-Q/A). As Leap explained, management and PwC believed that internal controls were effective until the errors were discovered. Plaintiff alleges no basis to infer that the Audit Committee should have second-guessed the judgment of Leap's management and outside auditors regarding the efficacy of Leap's internal controls – indeed, the Audit Committee was entitled to rely on their judgment and to be "fully protected" in so doing. Del. Code tit. 8, § 141(e); *see* note 11, below. As Leap explained:

> "Management had previously concluded that the Company maintained effective internal control over financial reporting as of December 31, 2006.
>
> In connection with the restatement … management determined that the material weakness discussed below existed as of December 31, 2006. Accordingly, management has now concluded that our internal control over financial reporting was not effective as of December 31, 2006. In connection with management's assessment of internal control over financial reporting, management identified the following material weakness as of December 31, 2006:
>
> There were deficiencies in our internal controls over the existence, completeness and accuracy of revenues, cost of revenues and deferred revenues. Specifically, the design of controls over the preparation and review of the account reconciliations and analysis of revenues, cost of revenues and deferred revenues did not detect the errors in revenues, cost of revenues and deferred revenues. A contributing factor was the ineffective operation of our user acceptance testing (i.e., ineffective testing) of changes made to our revenue and billing systems in connection with the introduction or modification of service offerings. This material weakness resulted in the accounting errors which have caused us to restate our consolidated financial statements[.] *Id.*

He contends that Targoff and Hutcheson also face a "substantial likelihood" of liability on the insider trading claim. *Id*. ¶ 77a.

III. ARGUMENT

A. Delaware Law Governs Plaintiff's Standing To Bring This Action

"A shareholder seeking to represent the interests of a corporation through a derivative suit must either demand that the corporation's directors take action or plead with particularity the futility of making such a demand." *Jones ex. rel. CSK Auto Corp. v. Jenkins*, 503 F. Supp. 2d 1325, 1331–32 (D. Ariz. 2007); Fed. R. Civ. P. 23.1 (a derivative complaint must "state with particularity" the plaintiff's pre-suit demand effort or "the reasons for not . . . making the effort"). The purpose of the demand requirement is to "affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation," if the directors believe that the best interests of the corporation will be served. *CSK Auto*, 503 F. Supp. 2d at 1331, quoting *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 96 (1991). While Federal Rule 23.1 requires a derivative plaintiff to plead an excuse for failure to make a demand "with particularity," Delaware law governs what allegations may be sufficient to excuse demand in this case. *CSK Auto*, 503 F. Supp. 2d at ("Rule 23.1 does not establish guidelines for determining when demand would be futile" and, therefore, "a court must look to the substantive law of the state of incorporation").[5]

In order to excuse his failure to make a demand, Plaintiff must plead facts meeting the standards set forth in *Rales v. Blasband*, 634 A.2d 927, 933-34 (Del. 1993).[6] *See Guttman v. Huang*, 823 A.2d 492, 499 (Del. Ch. 2003) (applying *Rales* where, as here, directors were

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[5] Delaware law controls as Leap's state of incorporation. The "internal affairs doctrine" recognizes that "only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); Cal. Corp. Code § 2116 (codifying the internal affairs doctrine).

[6] *Rales* governs the determination of demand futility where the alleged corporate claims, like those alleged here, do not challenge a business decision of the board. *See Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006). An alternative test set forth in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), governs when the claims challenge a business decision. *Id*. at 814.

accused of trading on inside information and failing to assure compliance with accounting standards). Under *Rales*, Plaintiff must allege facts that, if true, establish a "reasonable doubt" that a majority of the board is sufficiently (1) disinterested and (2) independent to exercise valid business judgment in responding to a demand to act on the alleged claims. 634 A.2d at 933-34; *see Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 977 (Del. Ch. 2003), *aff'd*, 845 A.2d 1040 (Del. 2004) ("*Rales* requires that a majority of the board be able to consider and appropriately to respond to a demand 'free of personal financial interest and improper extraneous influences'").[7] "Reasonable doubt" cannot be based on "mere suspicions or stated solely in conclusory terms." *Grimes v. Donald*, 673 A.2d 1207, 1217 (Del. 1996).

To protect companies from strike suits by shareholders who simply sue the whole board in order to avoid the demand requirement, Delaware courts developed standards for determining when a director is "interested" in a claim. Directors are "interested" only if they allegedly engaged in "such egregious conduct … that they face a substantial likelihood of liability" on the claim. *Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995); *Rales*, 634 A.2d at 936; *Guttman*, 823 A.2d at 500 (discussing the problem of strike suits). Directors lack independence if they allegedly are so "dominated or otherwise controlled" by an *interested* person (*Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988)), that "their discretion would be sterilized." *Rales*, 634 A.2d at 936–37. As shown below, Plaintiff's conclusory, boilerplate allegations do not show that any of Leap's directors, much less a majority, are either personally "interested" in the alleged claims, or lack independence from any "interested" person.

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[7] The board's decision on a shareholder demand to take action is a business judgment. The "business judgment rule" is the "presumption that in making a business decision the directors . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Brehm v. Eisner*, 746 A.2d 244, 264 n. 66 (Del. 2000) (citations and quotations omitted). Demand futility allegations must overcome this presumption by establishing "reasonable doubt" that the directors are capable of exercising disinterested and independent business judgment. *Rales*, 634 A.2d 927. *See also In re IAC/InterActive Corp. Sec. Litig.*, 478 F. Supp. 2d 574, 598 (S.D. N.Y. 2007) (applying Delaware law and holding that "Directors are entitled to a presumption that they were faithful to their fiduciary duties, thus the burden is upon the plaintiff to allege particularized facts to rebut the presumption at the pleading stage.").

B. Plaintiff Does Not Allege Any Adequate Excuse For Failure For Make A Pre-Suit Demand

When this lawsuit was filed, Leap's board was (and still is) composed of five directors – one inside director (CEO Hutcheson) and four outside directors. Plaintiff must plead, with particularity, facts demonstrating that at least *three* of these directors would have been unable to fairly exercise business judgment on a pre-suit demand. Plaintiff contends that the directors are all "interested" because each faces a "substantial likelihood" of liability for breach of fiduciary duty and violation of Section 10(b) based on Leap's erroneous financial reporting, and two of the directors face a "substantial likelihood" of liability for allegedly selling stock on non-public knowledge of Leap's accounting errors. Complaint ¶ 77. As shown in the discussion in Section B.1, below, Plaintiff's allegations do not allege a "substantial likelihood" of liability under any of these theories and, therefore, fail to establish that any director is "interested."

Plaintiff does not even attempt to allege that any of the directors lack "independence," except for Hutcheson. Plaintiff contends that Hutcheson is not independent of Rachesky or Targoff because they, as members of Leap's compensation committee, control Hutcheson's compensation. *Id.* ¶ 77c. The trouble with Plaintiff's argument is that neither Rachesky nor Targoff are "interested" because neither faces a "substantial likelihood" of liability, as discussed below. Thus, even assuming Hutcheson lacks independence from them, there is no basis to infer that Rachesky or Targoff would control or influence Hutcheson's business decision on a demand. *See Beam v. Stewart*, 845 A.2d 1040, 1049–50 (Del. 2004) (plaintiff "must create a reasonable doubt that a director is not so 'beholden' to an **interested** director . . . that his or her discretion would be sterilized.") (emphasis added); *Brehm v. Eisner*, 746 A.2d 244, 258 (Del. 2000) (issue of director independence need not be reached when plaintiff had not shown director interest).

Moreover, if Plaintiff's analysis were correct, it is hard see how a CEO could *ever* exercise business judgment free from the presumed influence of the compensation committee or the board. This nonsensical result would throw Delaware corporate law on its head. *See In re Verisign, Inc. Derivative Litig.*, 531 F. Supp. 2d 1173, 1196 (N.D. Cal. 2007) (rejecting argument that CEO lacks independence solely due to interest in employment and compensation); *Jacobs v.*

Yang, 2004 Del. Ch. LEXIS 117, at *17–18, (Del Ch. Aug. 2, 2004) (CEO independent despite possible loss of employment). In short, Hutcheson is clearly "independent" for purposes of considering a pre-suit demand in this case. But even if he were not counted, there would still be a majority of *four concededly independent* directors – and Plaintiff has alleged no "substantial likelihood" of liability with respect to any of the five.

1. Plaintiff Does Not Allege That Any Director Faces A "Substantial Likelihood of Liability"

As noted, to show that each of the directors has a disabling "interest" in the asserted claims, Plaintiff must allege that they each "face a 'substantial likelihood' of personal liability" from the challenged conduct. *Rales*, 634 A.2d at 936; *Guttman*, 823 A.2d at 501. The "mere threat" of liability is not enough – otherwise, would-be derivative plaintiffs could side-step the demand requirement simply by suing the whole board, as Plaintiff has done here. *Guttman*, 823 A.2d at 500. The particularized facts must show "egregious circumstances" surrounding the director's conduct. *Rattner v. Bidzos*, 2003 Del. Ch. LEXIS 103, at *29 (Del. Ch. 2003).

The ordinary standard of liability for Delaware directors is gross negligence, but the existence of a fiduciary shield raises the liability bar higher. *Desimone v. Barrows*, 924 A.2d 908, 933 (Del. Ch. 2007). Delaware law permits stockholders to eliminate directors' liability for gross negligence and other breaches of fiduciary duty that fall short of intentional misconduct, bad faith, or disloyalty. Del. Code tit. 8, § 102(b)(7); *see In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 65 (Del. 2006) (the "exculpatory provision affords significant protection to directors of Delaware corporations"). Leap's stockholders adopted such a "fiduciary shield" provision. RJN, Exh. A, at 3–4. Thus, to plead an excuse for failure to make a demand, Plaintiff must allege a "substantial likelihood" of director liability for conduct that would not be exculpated by the fiduciary shield – *i.e.*, intentional misconduct, bad faith or disloyalty. Plaintiff's conclusory allegations do not come close.

Delaware courts have long established that the fiduciary shield may be invoked at the pleading stage to challenge the adequacy of demand futility allegations. *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006) (section 102(b)(7) shield provision is "[c]ritical" to a plaintiff's

demand futility argument based on a likelihood of personal liability); *see In re Sagent Tech. Inc. Derivative Litig.*, 278 F. Supp. 2d 1079, 1095 & n.9 (N.D. Cal. 2003) (taking judicial notice of the shield on a motion to dismiss derivative claims for failure to make a demand).[8] The fiduciary shield is critical to assessment of the director's alleged potential liability exposure. As the Delaware Supreme Court has held, "even if the plaintiffs had stated a claim for gross negligence, such a well-pleaded claim is unavailing [where] defendants have brought forth the Section 102(b)(7) charter provision that bars such claims. This is the end of the case." *Malpiede v. Townson*, 780 A.2d 1075, 1094–95 (Del. 2001) (emphasis added). As discussed below, Plaintiff has not alleged that any director faces a "substantial likelihood" of liability on any theory.

a. No Likelihood of Liability For Alleged Failure of Oversight

Plaintiff's leading liability theory is that Leap's directors breached their duty of loyalty to Leap by causing, permitting, or failing to prevent Leap from issuing "false" financial statements, when the directors supposedly "knew" that the accounting was incorrect and that Leap's internal controls over financial reporting were deficient. Complaint ¶¶ 2, 34–35, 65–66. While Plaintiff blames the whole board for these illusory failings, his allegations are directed primarily against the Audit Committee. *Id.* ¶¶ 37–39, 67–71.

This is a classic "failure of oversight" claim governed by the standards set forth in *Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ct. Ch. 1996), recently reaffirmed by the Delaware Supreme Court in *Stone*, 911 A.2d at 370. Establishing director liability under *Caremark* is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967. "[O]nly a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable

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[8] *See also Guttman*, 823 A.2d at 501 (invoking the fiduciary shield in dismissing derivative claims for failure to plead demand futility); *In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270-71 (Del. Ch. 1995) (same); *Ash v. McCall*, 2000 Del. Ch. LEXIS 144, at *55 (Del. Ch. Sept. 15, 2000) (same, where plaintiffs failed to allege particularized facts that directors knew about but ignored accounting irregularities).

information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971 (emphasis added). "Imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations …thereby demonstrating a conscious disregard for their responsibilities," resulting in a breach of the duty of loyalty to the company and a failure to discharge their fiduciary duty in good faith. *Stone*, 911 A.2d at 370 (emphasis added). A *Caremark* claim "require[s] a finding that the directors acted with the state of mind traditionally used to define the mindset of a disloyal director – bad faith" – meaning a "knowing decision" to harm the corporation. *Desimone v. Barrows*, 924 A.2d 908, 935 (Del. Ch. 2007); *Guttman*, 823 A.2d at 506 (plaintiffs must show that "the directors were conscious of the fact that they were not doing their jobs").

Plaintiff's conclusory allegations do not demonstrate a "substantial likelihood" (or any likelihood) of director liability based on a *Caremark* claim. Plaintiff relies entirely on rote recitals that the directors "knew" of the accounting errors and "received numerous (unspecified) reports regarding problems with Leap's accounting and financial reporting practices and internal controls." Complaint ¶¶ 35, 65, 66. These allegations are nothing more than filler and no substitute for specific allegations that the directors "had clear notice of serious . . . irregularities and simply chose to ignore them." *Guttman*, 823 A.2d at 507; *Rattner*, 2003 WL 2228423, at *13 (rejecting similarly conclusory allegations as insufficient to excuse demand). "Plaintiff does not provide any particularized information about the internal corporate documents that [directors] allegedly reviewed, details of the conversations they had with other corporate officers, or what information was discussed at the Board meetings they attended." *CSK Auto*, 503 F. Supp. 2d at 1338–39 (applying Delaware law and dismissing complaint for failure to plead demand futility); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1454 (S.D. Cal. 1988) (same).

Indeed, Plaintiff alleges no factual information whatsoever to suggest that the directors "knew" about the accounting errors before Leap discovered them in the fall of 2007. To show the directors knew about the accounting errors and consciously disregarded them, Plaintiff would have to plead particularized facts demonstrating, for example, "red flags" that put the directors on notice of accounting errors or internal control deficiencies. *See David B. Shaev Profit*

Sharing Account v. Armstrong, 2006 Del. Ch. LEXIS 33, at *15 (Del. Ch. Feb. 13, 2006); *Guttman*, 823 A.2d at 507. While “red flags” are “useful when they are either waived in one’s face or displayed so that they are visible to the careful observer” (*Rattner*, 2003 Del. Ch. LEXIS 103, at *46, quotation omitted), Plaintiff does not wave flags of any color. The Complaint is dead on arrival, bereft any indicia that the directors had advance knowledge or notice of Leap’s accounting errors, much less ignored them.

Ironically, Plaintiff’s Audit Committee allegations affirmatively undercut any *Caremark* claim by demonstrating that Leap’s board had a reasonable system of oversight in place. *See Stone*, 911 A.2d at 373 (where oversight system exists and no “red flags” alert directors of problems, a *Caremark* claim is insufficient to excuse demand). As Plaintiff admits, Leap’s Audit Committee met regularly – indeed, frequently – throughout the relevant period to oversee Leap’s financial reporting. Complaint ¶¶ 32, 68–70. The Audit Committee met with management and with Leap’s independent outside financial statement auditors, PwC. *Id*. ¶¶ 68–70.

The Complaint does not allege, however, nor could it, that the Audit Committee was informed by management or PwC of the accounting errors or internal control weaknesses, which were only later identified as a result of Leap’s internal review in the fall of 2007. *See id*. ¶ 60 at 17:12-13. Under Delaware law, the Audit Committee was fully entitled to rely on Leap’s management and independent auditors in performing its oversight role and is “fully protected” from liability in so doing.[9] The fact that the Audit Committee’s exemplary performance of its oversight duties did not expose the accounting errors earlier cannot establish any basis for director liability. *See Caremark*, 698 A.2d at 972 (no director liability for failing to prevent

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[9] Directors may rely in good faith on reports by management and the company’s auditors and are “fully protected” from liability in so doing. 8 Del. Code § 141(e) (“<u>A member of the board of directors</u>, or a member of any committee designated by the board of directors, <u>shall</u>, in the performance of such member’s duties, <u>be fully protected in relying in good faith</u> upon the records of the corporation and <u>upon such information</u>, opinions, reports or statements <u>presented</u> to the corporation <u>by any of the corporation’s officers</u> or employees, or committees of the board of directors, <u>or by any other person as to matters</u> the member reasonably believes are <u>within such other person’s professional or expert competence</u> and who has been selected with reasonable care by or on behalf of the corporation.”) (emphasis added).

violations of health care laws); *David B. Shaev*, 2006 Del. Ch. LEXIS 33, at *15 (no director liability for failing to prevent improper corporate transactions).

Finally, Plaintiff labors under a general misconception that mere service on the Audit Committee somehow exposes the members to liability for issuing "false financial statements." Complaint ¶¶ 2, 38. Not surprisingly, there is no authority to support any such sweeping liability and the law is to the contrary. Audit committee membership, without more, provides no basis for liability for misstated financial statements, even if the members "reviewed [the] financial statements," or "actively participated" in issuing them. *CSK Auto*, 503 F. Supp. 2d at 1337.

As discussed, a restatement, standing alone, is not evidence of wrongdoing and is fully consistent with honest error. Restatements are required by GAAP "to reflect the correction of an <u>error</u> in [prior] financial statements." SFAS No. 154, RJN, Exh. C, at 18 (emphasis added); *Interpool*, 2005 U.S. Dist. LEXIS 18112, *15 (a restatement corrects "'mathematical errors," and "mistakes in the application of accounting principles," or use of facts that existed when the financial statements were prepared). Thus, contrary to Plaintiff's evident assumption, Leap's restatement is not an admission of any knowing or deliberate misstatement. Naturally, the law in the Ninth Circuit and elsewhere is consistent with GAAP: "[T]he mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish [a culpable state of mind]." *DSAM*, 288 F.3d at 391.[10] Thus, absent facts demonstrating that Leap's Audit Committee knew of the accounting errors – which Plaintiff cannot allege – the member's review of Leap's financial statements provides no basis for liability. *See CSK Auto* 503 F. Supp. 2d at 1337 (dismissing derivative claims where allegations did not show that the audit committee

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[10] *See, e.g.*, *In re Guess?, Inc. Sec. Litig.*, 174 F. Supp. 2d 1067, 1078 (C.D. Cal. 2001) ("violations of GAAP are just as consistent with the existence of an accounting problem of unknown scope as they are with intentions to hide the performance of the company"); *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1009–10 (S.D. Cal. 2000) ("Violations of GAAP or GAAS, standing alone, … provide no specific facts upon which a court can infer … state of mind"); *Fin. Acquisition Partners. v. Blackwell*, 440 F.3d 278, 290 (5th Cir. 2006) ("failure to follow accounting standards, without more, does not establish scienter"); *Chill v. GE*, 101 F.3d 263, 269 (2d Cir. 1996) ("allegations of a violation of GAAP provisions … without corresponding fraudulent intent, are not sufficient to state a securities fraud claim").

"knew about prior errors in [financial] statements"); *Guttman*, 823 A.2d at 494–95, 504 (dismissing derivative claims based on conclusory allegations of audit committee liability for restatement).[11] Even if Plaintiff had alleged some negligence in the Audit Committee's financial statement review process – which he has not – this would fall entirely within the protection afforded by Leap's fiduciary shield.[12] In short, Plaintiff has not alleged a "substantial likelihood" that the members of Leap's Audit Committee, or any other directors, are liable based on Leap's issuance of erroneous financial statements.

b. **No Likelihood of Liability Based on Alleged Insider Trading**

Plaintiff alleges that two directors – Hutcheson (the CEO) and Targoff (an outside director) – face a "substantial likelihood" of liability for unjust enrichment based on their sales of Leap stock several months before Leap announced discovery of accounting errors. Complaint ¶¶ 45, 83. The issue of whether Hutcheson and Targoff are "interested" in these claims for purposes of demand futility is somewhat academic. Setting both of these directors aside, there remains a board majority of three disinterested directors who could exercise valid business judgment on a demand to bring these claims – *i.e.*, Rachesky, LaPenta, and Harkey. None of these directors is alleged to lack independence from either Hutcheson or Targoff. *See id.* ¶ 77.

That said, Plaintiff's conclusory allegations of illegal insider trading are not sufficient to make even Hutcheson or Targoff "interested." Plaintiff alleges that Hutcheson sold stock on February 27, 2007 and May 23, 2007, and Targoff sold stock on June 6, 2007. *Id.* ¶ 45. Plaintiff contends, without any factual support, that these sales were based on knowledge of Leap's accounting errors. *Id.* ¶ 83. These sales occurred, however, three to six months *before* Leap

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[11] *See also Jones v. Jenkins*, 503 F. Supp. 2d 1325, 1333–36 (D. Ariz. 2007) (rejecting conclusory derivative allegations that audit committee members participated in, reviewed or failed to oversee and prevent inaccurate false statements as insufficient to excuse demand); *Rattner*, 2003 Del. Ch. LEXIS 103 at *48 (audit committee does not face liability merely because the company issued incorrect financial statements); *In re Coca-Cola Enters.*, 478 F. Supp. 2d 1369, 1378 (N.D. Ga. 2007) ("a director is not interested merely by virtue of sitting on an Audit Committee while the corporation faces accounting and audit irregularities").

[12] *See Sagent*, 278 F. Supp. 2d 1979 at 1092–93 (dismissing derivative claims against audit committee based on false financial statements where allegations failed to show intentional misconduct or bad faith that would not be exculpated by the fiduciary shield).

even *initiated* the internal review in September 2007 that led to discovery of the accounting errors announced on November 9, 2007. *Id*. ¶¶ 60 at 17:12-13; 56. Apart from Plaintiff's bare assertions, he alleges nothing to show that Hutcheson or Targoff had the faintest idea of the existence of the accounting errors when they sold stock.

As many courts have recognized, it is normal, lawful, and expected for corporate officers and directors to trade in a company's securities. *See*, *e.g.*, *Sagent*, 278 F. Supp. 2d at 1089 ("[B]are allegations of stock sales are insufficient (to plead lack of disinterest) because the trading of stock (by insiders) is not itself improper under Delaware law."); *Guttman*, 823 A.2d at 502 ("As a matter of course, corporate insiders sell company stock").[13] So, in order to allege that particular trades were *unlawful*, a plaintiff must plead facts demonstrating "that the selling defendants acted with scienter." *Guttman*, 823 A.2d at 505 (dismissing conclusory derivative claims for insider trading). That means pleading "with detail that each sale by each individual defendant was entered into and completed on the basis of, and because of, adverse material non-public information." *Coca-Cola*, 478 F. Supp. 2d at 1380; *Mitzner v. Hastings*, 2005 U.S. Dist. LEXIS 835, at *14 (N.D. Cal., Jan. 14, 2005) (plaintiff must allege "particular facts … connecting particular trades to information acquired at particular times"); *Rattner*, 2003 Del. Ch. LEXIS 103 at *36–38 (rejecting conclusory derivative insider trading allegations).

This is exactly what Plaintiff has *not* alleged. The Complaint is "devoid of any particularized facts that could lead to the inference that the timing of the trades reflected the . . . Defendants' impermissible insider trading." *Rattner*, 2003 Del. Ch. LEXIS 103, at *34. A director is not "'interested' whenever a derivative plaintiff cursorily alleges that he made sales of company stock in the market at a time when he possessed material, non-public information." *Guttman*, 823 A.2d at 502. Because Plaintiff offers nothing more than conclusory allegations, he

[13] *See also McCall v. Scott*, 239 F.3d 808, 825 (6th Cir. 2001) (officers and directors who receive compensation in stock and options "should be expected" to trade those securities).

has failed to allege that either Hutcheson or Targoff face a "substantial likelihood" of liability for unjust enrichment based on illegal insider trading.[14]

c. No Likelihood of Liability For Alleged Securities Fraud

Plaintiff asserts a last ill-conceived claim that all of the defendants committed securities fraud against Leap. How? Plaintiff does not say. Presumably, the claim is based on Leap's erroneous financial statements. *See* Complaint ¶ 86. Plaintiff asserts that Leap was "deceived" into granting unspecified restricted stock and options. *Id.* ¶ 89. Plaintiff does not shed any light on what corporate constituencies of Leap were allegedly "deceived." Since Plaintiff has sued everyone on the board and most of the senior management team for perpetrating the alleged deception, it is difficult to imagine who might be left to serve as a victim. *See Verisign*, 531 F. Supp. 2d at 1209 (dismissing derivative Section 10(b) claim and holding that "[r]eliance cannot be established when the individual allegedly acting on a misrepresentation 'already possess information sufficient to call the representation into question[,]'" citing *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1030 (9th Cir. 1992)).

This patently defective claim presents no "substantial likelihood" of liability on the part of Leap's board of directors, and no basis to infer any impairment of the directors' ability to disinterestedly consider a demand to assert the claim. Plaintiff has made no effort to comply with the pleading standards under the PSLRA required to state a federal securities fraud claim against the directors. The PSLRA takes the fraud pleading standards beyond Rule 9(b). It requires that "[t]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement

[14] Plaintiff took the alleged trading information from the SEC Forms 4 on which Hutcheson's and Targoff's sales were publicly reported as required by the SEC. Those Forms 4, which are provided for judicial notice, (RJN, Exhs. F, G, and H) reflect data that counters Plaintiff's allegations of improper trading. Specifically, Hutcheson's sale on February 27, 2007 was reported pursuant to a predetermined, non-discretionary 10b5-1 trading plan. RJN, Exh. F, at 58. *See Provenz v. Miller*, 102 F.3d 1478, 1491 (9th Cir. 1996) ("credible and wholly innocent explanations for stock sales, ranging from long-standing programs of periodic divestment, to the need to free cash to meet matured tax liabilities [if unrebutted] are sufficient to defeat any inference of bad faith.") (internal citations and quotations omitted).

or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).

The PSLRA also further requires plaintiffs to plead the scienter of each defendant "with respect to each act or omission" alleged to violate Section 10(b) and, further, must "state with particularity facts giving rise to <u>a strong inference</u> that the defendant acted with [scienter]." 15 U.S.C. § 78u-4(b)(2) (emphasis added). Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." 15 U.S.C. § 78u-4(b)(2); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007). In the Ninth Circuit, scienter means "deliberately reckless or conscious misconduct" (*DSAM*, 288 F.3d at 388–89), that "come[s] closer to demonstrating <u>intent</u>, as opposed to mere motive and opportunity.'" *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (emphasis added).

Plaintiff's pleading deficiencies under the PSLRA are exposed in detail in the individual defendant's motion to dismiss, and need not be repeated here. The bottom line is, Plaintiff has not alleged that any director made, approved, or signed any allegedly false financial report, while knowingly or recklessly disregarding any material errors or misstatements. Plaintiff's allegations of "access" to unspecified reports, attendance at unspecified meetings, and participation in unspecified communications does not support an inference that the directors possessed any contemporaneous information of accounting errors in Leap's financial statements. *See, e.g.*, *Lipton v. PathoGenesis Corp.*, 284 F.3d 1027, 1036 (9th Cir. 2002) (conclusory allegations of "access to internal data" is insufficient to plead scienter); *Alaska Elec. Pension Fund v. Adecco, S.A.*, 434 F. Supp. 2d 815, 831 (S.D. Cal. 2006) (dismissing 10(b) claim where plaintiff failed to plead "details as to the information" allegedly provided to defendants); *In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1159–60 (C.D. Cal. 2007) (plaintiffs "cannot base an inference of scienter on unspecified documents and conversations").[15]

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[15] *See also In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1088 (9th Cir. 2002) (dismissing 10(b) claim where plaintiffs "failed to cite any specific report, to mention any dates or contents of reports, or to allege their sources of information about any reports"); *Verisign*, 531 F. Supp. 2d at 1207 (dismissing 10(b) claim where complaint "contain[ed] no specific allegations of contemporaneous reports or data supporting the assertions of scienter – not a

Plaintiff's assertion of this Section 10(b) claim only underscores the wisdom of the demand requirement which puts the decision to sue in the hands of the board. While purporting to stand in Leap's shoes, Plaintiff attacks as fraudulent the same financial statements that Leap is *defending* in a Section 10(b) securities investor class action pending before this Court in *HCL Ltd. Partners v. Leap Wireless International, Inc.*, Case No. 07cv2245 BTM (NLS). Plaintiff's assertion of this claim does not reflect careful consideration of Leap's best interests.

C. Plaintiff Fails To Allege Continuous Stock Ownership With Particularity

Rule 23.1 sets forth the "continuous ownership" rule for derivative standing: a plaintiff bringing a derivative action in the right of the corporation must allege with particularity his status as a shareholder. Fed. R. Civ. P. 23.1; *see also* Del. Code tit. 8, § 327. The Ninth Circuit has made clear that Rule 23.1 "requires that a derivative plaintiff be a shareholder at the time of the alleged wrongful acts and that the plaintiff retain ownership of the stock for the duration of the suit." *Lewis v. Chiles*, 719 F.2d 1044, 1047 (9th Cir. 1983). General allegations of ownership at "times relevant" is insufficient; particularized allegations of continuous ownership is required. *Sagent*, 278 F. Supp. 2d at 1096–97 (a plaintiff has "no standing to sue for misconduct that occurred prior to the time he became a shareholder of the corporation").

The continuous ownership rule thus requires Plaintiff to plead with particularity that he was a shareholder continuously from 2004 to 2007 and during the pendency of this case. *Kona Enters., Inc. v. Estate of Bishop*, 179 F.3d 767, 769–70 (9th Cir. 1999); *Chiles*, 719 F.2d at 1047. Plaintiff has failed to do so. Plaintiff only vaguely alleges that he is and was "at all relevant times" a shareholder of Leap without alleging any specific timeframe. Complaint ¶ 7. This is insufficient to satisfy Rule 23.1 and the Complaint must be dismissed on this ground. *See In re Computer Scis. Corp. Derivative Litig.*, 2007 WL 1321715, at *15 (C.D. Cal. 2007) (dismissing derivative complaint under Rule 23.1 because "the Complaint only generally allege[d] that each

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single facts showing what each defendant knew, when he/she knew it, or how he/she acquired that knowledge").

Plaintiff 'is, and was during the relevant period,' or 'is, and was at all times relevant to,' a shareholder").

IV. CONCLUSION

If Plaintiff fails to serve this action on or before June 6, 2008, Leap requests that this Court dismiss the Complaint for lack of prosecution under Federal Rules 4(m) and 41(b). If the action is served, Leap requests that the Court dismiss the Complaint under Federal Rule 12(b)(6) because Plaintiff has failed to establish standing to assert Leap's corporate claims under Federal Rule 23.1 and Delaware law.

Dated: May 30, 2008

Respectfully submitted,

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